

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

FEB -7 2008

COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2007-0253-PR
	)	DEPARTMENT B
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
JOSE LUIS SUZARREY,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20042375

Honorable Ted B. Borek, Judge

REVIEW GRANTED; RELIEF DENIED

Law Offices of DiCampli, Elsberry & Hunley, LLC  
By Anne Elsberry

Tucson  
Attorneys for Petitioner

E S P I N O S A, Judge.

¶1 Petitioner Jose Luis Suzarrey challenges the trial court's summary denial of relief on the petition for post-conviction relief he filed pursuant to Rule 32, Ariz. R. Crim.

P. We grant review but deny relief.

¶2 In October 2004, Suzarrey pled guilty to a single count of promoting prison contraband, admitting he had possessed approximately one-third of a gram of heroin while

he was incarcerated on an unrelated charge in 2003. In August 2005, the trial court suspended the imposition of sentence and placed Suzarrey on a five-year probationary term.<sup>1</sup> Sometime thereafter, Suzarrey was incarcerated on an unrelated charge, the details of which do not appear in the record before us. He was apparently released from that incarceration on March 6, 2006. On March 28, 2006, the state filed a petition to revoke his probation in this case. After Suzarrey admitted two of the allegations in the petition, the trial court revoked his probation and sentenced him to a presumptive term of five years' imprisonment, crediting him with ninety-seven days previously served. At the disposition hearing, Suzarrey's counsel argued that Suzarrey was entitled to an additional "eight to nine months" incarceration credit based on the time he had spent in custody on the unrelated charge after being placed on probation in this case. The trial court expressed its concern that Suzarrey was not entitled to "double credit," but gave counsel additional time to brief the matter, which counsel did not do.

¶3 Suzarrey filed a petition for post-conviction relief<sup>2</sup> acknowledging that he had not been entitled to credit for the time he spent incarcerated on the other matter because he had not served that time as a condition of his probation in this case. He asserted, however,

---

<sup>1</sup>Suzarrey did not appear for the original sentencing date of November 17, 2004, and a warrant was issued for his arrest. He was arrested in July 2005 and held in custody until his sentencing on August 24, 2005.

<sup>2</sup>Although the "petition" was called a "notice," Suzarrey had already filed a notice, and the second "notice" was obviously intended to be a petition and was treated as such by the trial court.

that either his counsel at the original sentencing in this case or his counsel in the unrelated case had been ineffective in failing to file a motion to modify the terms of his probation to include that condition when he was incarcerated on the other charge. The trial court summarily dismissed the petition. We review the trial court's action for an abuse of discretion. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶4 To prove ineffective assistance of counsel, a petitioner must show counsel's performance fell below objectively reasonable standards and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a petitioner fails to establish either prong of the *Strickland* test, the claim necessarily fails. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). In this case, Suzarrey failed to show either deficient performance or prejudice.

¶5 Suzarrey's sole contention below was his unsupported assertion that:

when faced with a situation in which a defendant is facing jail or prison time on a case different than the one in which he has been sentenced to probation, it is common practice for trial counsel to make a petition to modify the terms of probation so as to make the jail or prison time [served on an unrelated case] a condition of probation pursuant to A.R.S. § 13-901(F).

Suzarrey provided no evidentiary support for this contention, nor did he argue—except perhaps by implication—that failure to abide by this “common practice” constituted deficient performance. *See State v. Rosario*, 195 Ariz. 264, ¶ 23, 987 P.2d 226, 230 (App. 1999) (“petitioner must offer some demonstration that the attorney's representation fell

below that of the prevailing objective standards”). Indeed, he did not even identify which counsel he believed had had the obligation to move to modify Suzarrey’s probationary terms. Moreover, Suzarrey offered no authority, nor even argument, that such a motion would likely have been granted. *See id.* (“The burden is on the petitioner and the showing must be that of a provable reality, not mere speculation.”). Suzarrey did not meet his burden on his claim of ineffective assistance of counsel; therefore, the trial court did not abuse its discretion by summarily dismissing the petition for post-conviction relief. Consequently, although we grant review, we deny relief.

---

PHILIP G. ESPINOSA, Judge

CONCURRING:

---

PETER J. ECKERSTROM, Presiding Judge

---

GARYE L. VÁSQUEZ, Judge